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No. .....

In The

Supreme Court of the United States

October Term, 1984

HUSTLER MAGAZINE, INC.,

Petitioner-Defendant

v.

LAJUAN and BILLY WOOD,

Respondents-Plaintiffs

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the constitutional requirements for liability for false light invasion of privacy laid down in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) should be modified to coincide with the constitutional requirements for liability in libel law expressed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) so that a publisher can be held liable for false light invasion of privacy arising from reports of matters of public interest in the absence of proof that the publisher published the report with knowledge of its falsity or serious doubts about its truth.

2. Whether a court's imposition of an obligation to verify accurately the validity of a written consent authorizing publication of a photograph denies the publisher rights protected by the First Amendment when the publisher has no knowledge that the consent is forged and has no serious doubts about the validity of the written consent.

PARTIES TO THE PROCEEDING BELOW

The Defendant-Petitioner is Hustler Magazine, Inc. The Plaintiffs-Respondents are LaJuan and Billy Wood.

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REFERENCE TO OPINIONS

The Judgment and Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Texas, Houston Division, dated March 1, 1983, was not reported and is reproduced as Appendix A.

The original opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported and is reproduced as Appendix B.

The opinion of the United States Court of Appeals for the Fifth Circuit on rehearing is reproduced as Appendix C.

JURISDICTION

The Judgment of the Court of Appeals was entered on July 23, 1984. Rehearing was denied on September 11, 1984, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

The Fourteenth Amendment to the United States Constitution states in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

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STATEMENT OF THE CASE

(i) Course of proceedings and disposition in the Court below.

On January 23, 1981, LaJuan Wood and Billy Wood brought suit against Hustler Magazine, Inc., claiming the publication of a nude photograph of LaJuan Wood identified as "photo by husband" and accompanied by text in its February 1980 edition constituted libel, invasion of privacy, and other claims. Plaintiffs' Original Complaint (Tab 1, R.A. 430); Plaintiffs' First Amended Complaint (R.A. 377). The Woods later amended their complaint to delete the libel allegations, Plaintiffs' Second Amended Complaint (Tab 38, R.A. 272), recognizing that they were bound by a one-year statute of limitations. Plaintiffs' Response to Defendants' Motion for Summary Judgment (Tab 29, R.A. 293, 296).

Trial was to the court and on March 1, 1983, the court rendered judgment that Appellant was liable to Mrs. Wood in the amount of $150,000 and to Mr. Wood in the amount of $25,000 (Tab 90, R.A. 20) for invasion of the Woods' privacy by publicly disclosing private facts and by placing them in a false light. (Tab 89, R.A. 21-38). On July 23, 1984, the Fifth Circuit affirmed the judgment for LaJuan Wood on the false light claim and reversed the judgment for Billy Wood on the ground that the record showed no evidence of mental anguish or suffering on his part caused

by invasion of his privacy. *Hustler* filed a timely Motion for Rehearing and Suggestion for Rehearing En Banc, both of which were denied without opinion on September 11, 1984.

(ii) Statement of facts

This action arose out of *Hustler's* publication of an outdoor nude photograph of LaJuan Wood sitting on a log in its section featuring amateur nude photography entitled "Beaver Hunt." The photograph was taken while LaJuan and her husband Billy Wood were camping at a state park. (Plaintiffs' Exhibit 1, p. 94) LaJuan and Billy Wood were hot after hiking for some time in the wilderness, stripped and went swimming. Then they took nude photographs of each other, which they had developed at FedMart in Bryan, Texas, where they lived. (Tr. Vol. I, p. 13). Billy Wood did not submit LaJuan Woods' photograph to *Hustler*, and LaJuan Wood did not give *Hustler* permission to publish her photograph. (Tr. Vol. I, p. 15).

Hustler was duped into publishing the photograph by Kelley McConkey Simpson Rhoades ("Ms. Rhoades"). Ms. Rhoades and her then-husband, Steve Simpson, lived in a duplex next door to LaJuan and Billy Wood. (Tr. Vol. II, p. 5) Steve Simpson burglarized the Wood home and in the course of the burglary stole several of the nude photographs of LaJuan Wood and Billy Wood. (Tr. Vol. II, p. 13). Together he and Ms. Rhoades filled out a form published by *Hustler* authorizing publication of photographs in the "Beaver Hunt" section. (Tr. Vol. II, p. 6-7, 14-16) Some of the information was true, such as Ms. Wood's name and hobby—collecting arrowheads; some of the information was false, such as the birthdate and sexual

fantasy. They listed Ms. Rhoades' parents' address in the space for addresses. (Tr. Vol. II, p. 14).

Hustler had been publishing "Beaver Hunt," which featured posed amateur snapshots of nudes, since the summer of 1976. (Tr. Vol. II, p. 87). *Hustler's* policy required that when a photograph and release were received, its Research Department would call the model at the number listed in the release and verify the information provided in the release and obtain further assurance that the model wished the photograph to be published. If the model did not list a telephone number, the Research Department would send a telegram or mailgram to the model at the address on the release and ask the model to call collect. (Tr. Vol. II, p. 100). Nothing in Appellant's release or the "Beaver Hunt" section warned submitters that telephone verification would occur. (Tr. Vol. I, p. 128). No photograph was published without telephone verification.

Hustler's policy required that during the telephone call the researcher should ask questions of the model in such a fashion that the model had to supply the information on the release. (Tr. Vol. I, pp. 128, 190-192; Tr. Vol. II, pp. 148-49). If the model did not supply the same answers in the telephone conversation as appeared on the release, or said that she no longer wished her photograph to be published, then the model's photograph would not be published and she would be listed on the "Never-to-Run" list (Tr. Vol. I, pp. 158, 179-183; Tr. Vol. II, pp. 147-48), which, as its name implies, was a list of the names of models whose photographs should never be run. (Tr. Vol. I, p. 129). The Never-to-Run List was consulted before publishing any photograph and if a model's name

appeared on it—even if it was someone else—the photograph would not run. (Tr. Vol. I, p. 130). *Hustler* had never received any complaints about the hundreds of photographs run prior to Plaintiffs' action.[1]

Because the model release submitted with the photograph did not have a telephone number, *Hustler* sent "LaJuan Wood" a mailgram at the address listed—Ms. Rhoades' mother's house, (Tr. Vol. II, p. 9) where, unexpectedly, Ms. Rhoades was then living because her husband was in jail for burglarizing the Woods' home. (Tr. Vol. II, p. 9, 30). When Ms. Rhoades received the mailgram, in revenge against LaJuan and Billy Wood (Tr. Vol. II, p. 24) because of their role in the arrest, conviction and incarceration of Steve Simpson (Tr. Vol. I, p. 38), she called *Hustler*. The nature of Ms. Rhoades' conversation with *Hustler* staff member Stephanie Ross, who had handled hundreds of such calls, was a disputed fact

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1. From the section's inception, *Hustler* continuously consulted with its legal counsel on the wording of the release it required before publication and the procedures it should follow before publishing the photographs submitted. (Tr. Vol. II, pp. 98-107, 109). No industry standard for verifying amateur model releases existed when *Hustler* was formulating its procedures. Some magazines accepted a notarized release with no verification, some magazines called the models to verify releases, and some magazines used letters. (Tr. Vol. II, pp. 165-66). The Woods' expert testified that *Playboy* magazine may not even require the written release from some models, but instead will rely solely on the assurance of a professional photographer that he had a release. (Tr. Vol. I, pp. 76-77). *Hustler's* associate publisher, Charles David, testified that *Hustler's* attorney had advised it that its verification procedure was adequate and that he believed that the verification procedure was adequate. (Charles David deposition, p. 22, lines 16-20; p. 24, lines 5-14).

issue,[2] but it is undisputed that there was telephone verification of the written consent form.

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REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with the Decisions of this Court and other Courts of Appeal Concerning the Constitutional Restrictions upon the Imposing of Liability for Invasion of Privacy by Placing an Individual in a False Light

A. The Fifth Circuit's Decision conflicts with this Court's Decision in Time, Inc. v. Hill, reflecting the 10 years of uncertainty as to whether the principles of Time, Inc. v. Hill in false light invasion of privacy claims are still viable in light of Gertz v. Robert Welch, Inc.

In *Time, Inc. v. Hill,* 385 U.S. 374 (1967), this Court held that constitutional protections for speech and press precluded false light invasion of privacy claims arising from reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. 385 U.S. at 387-88. If that standard applies in this case, then the district court's judgment must be reversed, as no evidence and no findings of the district court support a judgment on that basis. However incautious the lower courts judged *Hustler,* the evidence

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2. The district court found that in the conversation between Stephanie Ross and Ms. Rhoades, "instead of making inquiries that did not suggest particular responses, Stephanie Ross merely rattled off a series of yes-no questions." (Findings of Fact No. 13, R. A. 27.) This was hotly disputed at trial and on appeal. See part II, *infra.*

established that *Hustler* had no knowledge that the consent form was forged and had no serious doubts about its validity. Indeed, the district court denied exemplary damages because it found no actual malice. See Conclusion of Law No. 9 (App. 15).

The Fifth Circuit refused to follow this Court's decision in *Time, Inc. v. Hill,* 385 U.S. 374 (1967) in evaluating whether *Hustler* should be liable for having been duped into publishing the nude photograph of LaJuan Wood. The Fifth Circuit did so in the belief that the principles stated in *Time, Inc. v. Hill* are no longer the law in light of the changes worked in the constitutional analysis of libel law by *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) and its progeny.

The Fifth Circuit thus cast its lot with the courts and commentators who have declared that this Court will abandon *Time, Inc. v. Hill* and adopt *Gertz's* private person/negligence v. public person/actual malice approach in false light invasion of privacy actions. *See, e.g., Fitzgerald v. Penthouse International, Ltd.,* 525 F.Supp. 585, 602-03 (D. Md. 1981), *aff'd,* 691 F.2d 666 (4th Cir. 1982); *Dresbach v. Doubleday & Co.,* 518 F.Supp. 1285, 1288-92 (D. D.C. 1981); *Hyde v. City of Columbia,* 637 S.W.2d 251, 266 n.22 (Mo. App. 1982); *Crump v. Beckley Newspapers, Inc.,* 10 Media L. Rep. 2225, 2239 (W. Va. Sup. Ct. App. Nov. 10, 1983); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* at 787 (1978); Wade, *The Communicative Torts and the First Amendment,* 48 Miss. L. J. 671, 708 (1977); Hill, *Defamation and Privacy Under the First Amendment,* 76 Colum. L. Rev. 1205, 1274 & n. 321 (1976). Its decision conflicts with the supreme courts of Arkansas,

Kentucky and Connecticut that have found *Time, Inc. v. Hill* still controlling absent modification. *Dodrill v. Arkansas Democrat,* 265 Ark. 628, 590 S.W. 2d 840, 845 n.9 (1979); *cert. denied,* 444 U.S. 1076 (1980); *McCall v. Courier-Journal,* 623 S.W.2d 882, 888 (Ky. Sup. Ct. 1981); *Goodrich v. Waterbury Republican-American,* 188 Conn. 107, 448 A.2d 1317 (1982).

Since *Gertz v. Robert Welch, Inc.,* this Court has not decided whether it will rethink *Time, Inc. v. Hill.* In *Cantrell v. Forest City Publishing Co.,* 419 U.S. 245 (1974), this Court raised the issue of:

> [W]hether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases. Cf. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323.

419 U.S. at 250-51. In the ten years since *Cantrell* the Court has continued to preserve its options. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 490 n. 19 (1975). As a result, both federal and state courts have been left to their own devices to decide whether *Time, Inc. v. Hill* principles still apply, with resulting confusion and uncertainty. Even the RESTATEMENT (SECOND) OF TORTS reflects the ambiguity. Section 652E retains the *Time, Inc. v. Hill* approach, but notes in comment d that "The effect of the *Gertz* decision upon the holding in . . . *Hill* has . . . been left in a state of uncertainty." RESTATEMENT (SECOND) OF TORTS § 652E, comment d, p. 398. This Court should grant the writ and resolve this uncertainty.

B. The principles of Time, Inc. v. Hill strike the proper balance in false light invasion of privacy cases.

In *Time, Inc. v. Hill* this Court recognized the dangers to a free press that could result from using negligence as the standard of liability for damages for placing someone in a false light:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. . . .
>
> In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees . . . . Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone . . .' and thus 'create the danger that the legitimate utterance will be penalized.'

385 U.S. at 389. The concerns for self censorship that motivated the Court in *Time, Inc. v. Hill* and in *Gertz v. Robert Welch, Inc.* are essentially the same. But the risk of self-censorship in privacy cases is significantly greater because of the different nature of a false light invasion of privacy claim.

The relatively recent tort of false light invasion of privacy is both broader and more ephemeral than the recognized common law tort of defamation and thus has even greater potential for chilling the exercise of First Amendment rights. In *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), Justice Powell, in his concurring opinion,

properly recognized that "causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." 420 U.S. at 500 (Powell, J., concurring). False light privacy claims may result from nondefamatory statements that adversely affect a person's "personality" or "image." The damages sought, as the Fifth Circuit below noted, are typically for "emotional disturbance." — F.2d at —. (App. 27.) These differences with libel law are substantial and warrant the greater protections for free speech afforded by *Time, Inc. v. Hill.*

First, the common law has always been reluctant to impose liability for mental anguish absent any physical injury on the basis of mere negligence. Courts have viewed emotional disturbance as "so evanescent a thing, so easily counterfeited, and usually so trivial" that they have required the commission of an intentional tort—with its elements of extreme outrage and moral blame—before authorizing such recoveries. W. Prosser, HANDBOOK OF THE LAW OF TORTS § 54, p. 328-29 (4th ed. 1971). False light privacy actions can be very subjective and intangible, and the claims of being placed in a false light and having been damaged thereby present the same problems that claims of emotional disturbance have historically raised. *Time, Inc. v. Hill's* proper requirement of what amounts to an intentional tort for such recovery guards against abuse of this very broad cause of action that can impact conduct of special constitutional significance.

Second, and related to the first point, *Time, Inc. v. Hill's* requirement of a knowing publication or publication with serious doubts about the truth discourages frivolous lawsuits designed to punish publications. In addition to

the danger from those who bring frivolous claims in the hope of favorable and unmerited recoveries, publishers and broadcasters must fear those who will utilize this cause of action to draw them into expensive and time-consuming litigation that they are powerless to swiftly dispose of because of jury issues of negligence, offensiveness, and damages that cannot be resolved short of a trial. Publishers or broadcasters may elect to forego stories on matters of public interest involving private persons rather than endure an unwarranted claim that is unresolvable short of trial and presents the possibility of massive and largely unanswerable damages claims.

Third, such claims, because they cannot be measured objectively, give a jury wide discretion in awarding damages—a discretion that can be used to punish those with views or expressions with which the jury disagrees. This Court has frequently noted the dangers of such discretion. *See, e.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 277-78 (1964); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). A publisher, as in this case, whose efforts come to naught because of a clever forger, faces a judge or jury with a blank check in hand and a license to find liability and damages solely on the plaintiff's description of his or her feelings. This is too much discretion, especially when the evidence is so subjective and unverifiable and the conduct at issue requires special protection to preserve the "breathing space" for free and open expression.

Fourth, because false-light claims may arise from the publication of non-defamatory matter, the burden on editors and publishers is even greater. The offensiveness of statements and whether those statements place an individual in a false light will vary according to the indi-

vidual, much more so than libel. The content of the publication in a privacy action—non-defamatory but offensive language—gives less notice than it does in a case of defamation as to whether liability may result. *See* Comment, *Privacy: the Search for a Standard,* 11 WAKE FOREST LAW REVIEW 659, 680 (1975). Incorporating *Gertz* principles into false light privacy claims is not consistent with constitutional guarantees because—unlike libel—the non-defamatory but offensive language's content would not warn a reasonably prudent editor or broadcaster of its potential to place someone in a false light. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 348 (1974). The protection against self-censorship that this principle in *Gertz* provides would be lost in invasion of privacy cases, resulting in greater restrictions on speech than this Court has said the First Amendment allows. The *Time, Inc. v. Hill* requirement of knowledge of falsity or serious doubts of truth preserves this significant protection. Knowledge of falsity or serious doubts about truth places a publisher or broadcaster on sufficient notice to take steps against portrayal of a person in a false light.

Finally, privacy interests must be balanced against society's interest in information "concerning interesting phases of human activity and embraces all issues about which information is needed or approprate so that individuals may cope with the exigencies of their period." *Campbell v. Seabury Press,* 614 F.2d 395, 397 (5th Cir. 1980). To the extent that persons are caught up in matters of public concern, they have no claim of invasion of privacy when private facts are revealed as part of information about those matters. Their interest is offset by society's interest in knowledge about events. Thus, unlike libel, invasion of privacy has always required an inquiry

into whether the matter discussed is one of such public interest that the privacy right must yield. *See e.g., Sidis v. F-R Pub. Corporation,* 113 F.2d 806 (2d Cir., 1940). Where that is true, the interest in redress for innocent or negligent offensive, false depiction must yield to the societal interest in knowledge and discussion. These competing interests must be considered in determining whether someone has been placed in a false light during a discussion of matters of public concern. *Time, Inc. v. Hill* strikes the proper accommodation of those interests.

In summary, a negligence standard in false light cases increases the temptation and capacity for persons who disagree with editorial opinions and characterizations in any kind of publication to bring suit alleging that such opinions or characterizations—even though not defamatory—place them in a false light and caused them mental anguish, and it allows like-minded juries to impose substantial damages as punishment rather than compensation. This would chill editorial comment for fear of a finding that the editorial writer or the author of a newsstory with editorial flourishes or characterizations negligently created a false image of the plaintiff resulting in unseen, unmeasurable, but nevertheless recoverable "damage" to the plaintiff's "personality." The concerns that have always made courts reluctant to award damages for such claims in cases of "emotional disturbance" are doubly reinforced by the fact that free speech interests are significantly and adversely affected by the fear of liability or even claims on the ground of "negligence."[3] To provide

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3. This case illustrates the danger: Plaintiffs obtained a judgment on the basis of the testimony of an "expert" who had no knowledge of the practices followed by prudent magazine publishers.

the breathing space that the First Amendment guarantees, a negligence standard is not enough; only the standard set forth in *Time, Inc. v. Hill* provides adequate protection. This matter affects all publications and thus merits the Court's consideration.

II. The Decision Below Raises Significant and Recurring Problems Concerning a Publisher's Obligation to Verify the Validity of Written Releases that Accompany Photographs

Even if *Gertz* principles did apply to this case, *Hustler* breached no duty to LaJuan Wood, although the forgers certainly did. The Fifth Circuit's decision, interpreting Texas law, imposed liability without fault on *Hustler* in contravention to *Gertz's* requirement that states cannot impose liability without fault. 418 U.S. at 347. *Hustler* relied upon a written consent form it had verified by telephone. It did not know, nor should it have known, that the consent form was forged and the telephone conversation was a fraud. It had no duty to engage in verification procedures in this case or, alternatively, if it had a duty, it fulfilled it. Thus, the imposition of liability for failing to adequately verify before publishing imposed liability without fault, denying to *Hustler* the protection afforded such publications by the First Amendment.

A photographer submitting a photograph for inclusion in a section featuring amateur photographs is much like an advertiser submitting ad copy, and a long line of cases establishes that "a newspaper has no duty to investigate each of the advertisers who purchases space in its publication." *Pressler v. Dow Jones & Co., Inc.*, 88 A.2d 928, 450 N.Y.S.2d 884 (N.Y. Sup. Ct. App. Div. 1982). In

Goldstein v. Garlick, 65 Misc.2d 538, 543, 318 NY.S.2d 370, 376 (N.Y. Sup. Ct., Queens County, 1971), the court explained why a newspaper should not be held liable for the effects of a published advertisement because of its failure to investigate the advertisement's claims:

> [A] rule [imposing liability for negligence] would make a newspaper an arbiter of the conflicting claims of competing advertisers and would impose an intolerable burden upon newspapers and would, in the end, have a chilling effect upon them since they would have to refuse many items submitted because of possibility that publication would lead to liability. Nor should the onerous burden be placed on newspapers under ordinary circumstances to conduct investigations in order to determine the effect of a questioned advertisement . . .

Id. Accord, DeBardelber Marine Corp. v. United States, 451 F.2d 140, 148 (5th Cir. 1970); *Yuhas v. Mudge,* 129 N.J. Super. 207, 322 A.2d 824 (1974); *Demuth Development Corp. v. Merck & Co., Inc.,* 432 F.Supp. 990 (E.D. N.Y. 1977); *see also* W. Prosser, THE LAW OF TORTS § 107 at 707-08 (4th ed. 1971). As long as a publisher acts without knowledge of falsity and without reckless disregard to the truth it is not liable in advertising cases, and the same principle should apply here, where *Hustler* exhibited the work of amateur photographers.

Practical reasons urge the application of the advertising principles here. Verification is a time-consuming and difficult process that would severely and unduly limit the publication of photographs in which a valid consent could not be verifed because of the unavailability of a party. Under contract principles and state statutes governing privacy the written consent form would be more than ade-

quate. *See, e.g.*, N.Y. Civ. Rts. Law §§ 50-51 (McKinney 1976). Once the contract or agreement has been entered into, one of the parties is not required to assure itself again that the other party still wishes to go through with the agreement.

The case of *Harlow v. Buno Company, Inc.*, 36 Pa. D. & C. 97 (Pa. 1939), explains the practical necessity for this approach. There Francis Harlow complained of the use of her photograph for commercial purposes. While she was employed as a beauty shop operator she had her hair made up and her photographs taken. The photographs were displayed in the shop to illustrate the beauty shop owner's artistry. Apparently unknown to Ms. Harlow, her photograph was forwarded to a publishing company for use in display placards that were to be sold for advertising purposes to beauty shops, barber shops and allied trades throughout the United States. The publishing company received the photograph and a release, which at trial Ms. Harlow said was a forgery.

Buno Company, Inc., a manufacturer of liquid hair preparations, ordered several thousand of the display cards containing the photograph of Ms. Harlow, placed its advertising copy on the photographs, and distributed them. It asked the publisher whether releases had been received from each of the models, and the publisher assured it that they had been. After the charts were distributed, Ms. Harlow brought suit against Buno Company, Inc., alleging an invasion of privacy. At trial the verdict was for Ms. Harlow. The court granted judgment notwithstanding the verdict for the defendant. In language equally applicable here, it concluded that liability was improper against the defendant because it did not know of the lack of consent:

> An examination of the theory of the doctrine in the decided cases indicates that the invasion must be intentional and that defendant must knowingly publish the photograph of plaintiff without authority. The practical hardship of the extension of this right beyond that limitation is apparent upon consideration of the facts in the case now before this court. The uncontroverted proof established not only that defendant was unaware that the use of this photograph was unauthorized but also that it acted with due regard to plaintiff's rights and in the exercise of the proper caution. Its participation was passive and in fact it merely acted as a conduit. To extend the liability to a person in the position of defendant would preclude the use of photographs or even portraits for commercial purposes. Defendant ascertained the existence of releases before it published the poster. *It is inconceivable that it should be held an insurer for the presence of a legally binding and uncontestable release.* If the burden of proving the authenticity of a release is imposed upon one who purchases advertising material from a publishing company, it would be necessary for him either to witness the execution of the release and in addition ascertain the identity of the model executing it, or if the release had already been executed to investigate and determine the identity of the various models appearing in the display chart and then assure himself that they had executed the releases in the possession of the publishing company. The practical difficulties of meeting such a burden are oppressive and would prevent the use of photographs for advertising purposes. It is evident, therefore, that the recognition of this right requires that liability for its invasion must be limited and cannot be extended without restriction. It is likewise apparent that the invasion of this right requires a direct trespass, the necessary element of which is intent.

36 Pa. D. & C. at 104-05. The *Harlow* court's statement of the law reflects common sense and is consistent with the constitutional guarantees that have been recognized

since it was decided in 1939. Like the Buno Company, Inc., *Hustler* did not have the burden of looking behind the written release.

The Fifth Circuit, ignoring *Buno* and imposing a duty of verification on *Hustler,* found a breach of that duty because *Hustler* allegedly did not follow its own verification procedure. The Fifth Circuit adopted the district court's finding that *Hustler's* research assistant asked leading questions of Ms. Rhoades, but *Hustler* showed at trial that it did follow its procedure.[4]

The two participants in the conversation were Stephanie Ross, then a research assistant for *Hustler,* and Kelley McKonkey Simpson Rhoades, the forger. Ms. Ross had a bachelors degree in fine arts from the California Institute of the Arts, she had attended graduate school at Western University, and she had taught speech. She testified that she believed she talked with Ms. Rhoades (thinking her at the time to be LaJuan Wood) in October of 1979 and, having been told by Ms. Rhoades that she was LaJuan Wood, verified the release with her. (Tr. Vol. I, p. 165.) Although Ms. Ross had no personal recollection of the conversation (Tr. Vol. II, p. 54), she testified that it was *Hustler's* policy and her normal and regular procedure during the verification telephone call to go down the form and ask the releasing party to supply the information that appears on the form. (Tr. Vol. I, p. 127.) She testified

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4. *Hustler* challenged the district court's finding of fact that its research assistant asked leading questions in the telephone contact at the Fifth Circuit but that court adopted without comment the district court's version of the facts. *Hustler* challenges the district court's findings here on this crucial issue and urges the Court to undertake a *de novo* review of the facts concerning the telephone contact. *See* Bose Corp. v. Consumers Union of U.S., Inc., — U.S. —, 104 S.Ct. 1949 (1984).

that she did not ask the questions in such a way that the person calling in would know what was on the form. (Tr. Vol. I, p. 128.) To do so would be inconsistent with the established procedure. (Tr. Vol. I, p. 192.) She play-acted her procedure with the Woods' counsel on cross-examination (Tr. Vol. I, pp. 179-82), asking him questions that did not supply the answers. Ms. Ross estimated that she had made at least two hundred phone calls to verify release forms and "very definitely" requested rather than supplied information. (Tr. Vol. I, p. 128.) The release form provided that the fee was to be paid to a Kelley Simpson, but Ms. Ross said this was not unusual and that she was sure she had inquired about that issue. (Tr. Vol. I, p. 189.) Ms. Ross flatly testified that if she had received any indication that the release was forged, she would not have run the photograph. (Tr. Vol. I, p. 158.)

Ms. Rhoades, the other participant in the conversation, testified at trial, at a number of points during her testimony, that she did not remember the form of the questions asked her. (Tr. Vol. II, pp. 17, 34, 40.) Ms. Rhoades testified, however, that she had an earlier version of the release before her when she called *Hustler*, from which she could supply the answers. (Tr. Vol. II, p. 10.) And, in the Woods' cross-examination, Ms. Rhoades remembered that Ms. Ross asked her what her hobby was and she had replied collecting arrowheads (Tr. Vol. II, p. 35), which is consistent with Stephanie Ross's version of the conversation.

The Fifth Circuit also faulted *Hustler* because it did not require a social security number, a driver's license number or notarization on its consent forms. In doing so the Fifth Circuit acted as if such approaches were ef-

fective or were mandated by the standard approach in the industry. No evidence established that these additional provisions would effectively prevent fraud or would have avoided publication here. Moreover, at trial the evidence showed no accepted industry method for handling model releases. Indeed, the Woods' "expert" had no knowledge of the verification processes used by individual magazines for nude photographs (Tr. Vol. I, p. 76-77), and he conceded that some magazines accept and publish photographs from some photographers without ever seeing any model releases. (Tr. Vol. I, p. 76.) *Hustler's* verification activities were well within these criteria. By holding *Hustler* liable under its own newly created verification requirement, the Fifth Circuit imposed liability on *Hustler* without fault.

The Fifth Circuit's verification requirements unduly impact the First Amendment rights of publishers and broadcasters. They unjustifiably stifle and discourage speech even though valid contractual consent forms may have been obtained and submitted. If publishers and broadcasters must run extensive double checks on apparently valid written releases to publish a potentially embarrassing photograph of any nature, they will likely forego this type of speech—no less constitutionally protected than news reporting or advertising[5]—to save costs. The Court recognized these dangers in *Time, Inc. v. Hill*, 385 U.S. at 389, and the dangers of self-censorship arising from the

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5. Indeed, publication of nude photographs for the enjoyment of readers is more fiercely protected under the constitution than publication of advertising. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

impossible burden of verification have not changed. *Hustler* and other publishers should be allowed to reasonably rely on written releases submitted to them in the absence of knowledge that the releases are forged or of serious doubts about their validity. The importance of this matter for all publishers and the public merits the Court's consideration.

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CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition should be granted, and the judgment of the Fifth Circuit Court of Appeals should be reversed and judgment rendered in Petitioner-Defendant's favor, or, alternatively, reversed and the cause remanded.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-186

LAJUAN AND BILLY WOOD

vs.

HUSTLER MAGAZINE, INC.

FINAL JUDGMENT

(Filed March 1, 1983)

The above-styled and numbered cause came on for trial before the Court, and the issues having been duly tried on January 10 and 11, 1983, and a decision having been duly rendered for the reasons stated in the Court's Findings of Facts and Conclusions of Law of even date, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff LaJuan Wood have judgment against Defendant Hustler Magazine, Inc. in the amount of $150,000.00, together with interest from the date that judgment is entered at the rate of 8.99% per annum until paid. It is further ORDERED that Plaintiff Billy Wood have judgment against Defendant Hustler Magazine, Inc. in the amount of $25,000.00 together with interest from the date that judgment is entered at the rate of 8.99% per annum until paid.

Signed this 1st day of March, 1983.

/s/ Robert O'Conor, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-186

LAJUAN AND BILLY WOOD

vs.

HUSTLER MAGAZINE, INC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed March 1, 1983)

The case presently before this Court is an action brought by Mr. and Mrs. Billy Wood to recover damages for injuries sustained by them as a consequence of the publication of a picture of Mrs. Wood in the February 1980 edition of *Hustler* magazine without her consent. A trial to the Court took place on January 10 and 11, 1983. After the parties rested the Court took the matter under advisement. Having duly considered all relevant evidence, the Court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff LaJuan Wood is twenty-seven years of age. She has been married to Plaintiff Billy Wood since May 22, 1976. The Woods have one child and are expecting another. They now live in Austin, Texas, but at the time of the events that formed the basis for this action they lived in College Station, Texas, which had been LaJuan's home since she was six years old.

2. Defendant Hustler Magazine, Inc. is an Ohio corporation that has qualified to do business in California

and New York. Its principal place of business is in Los Angeles, California, from which city it publishes *Hustler* magazine. *Hustler* is known in the industry as a "men's sophisticate magazine." A substantial portion of every issue of the magazine is devoted to sexually explicit material.

3. In January of 1980, Billy was teaching engineering design graphics at Texas A. & M. University. LaJuan was dividing her time between caring for her family and attending undergraduate classes at Texas A. & M.

4. One day during the week of January 7, 1980, Billy and LaJuan were eating lunch in their duplex when Andy Hollingshead, a neighbor, dropped by and announced that he had heard that LaJuan's picture was in the February issue of *Hustler*. All three friends laughed since they never even considered the possibility that the information might be correct. After Billy returned from lunch to the University, however, another friend called and said that he actually had seen the picture and that it was indeed a photograph of LaJuan in the nude. Billy then called LaJuan at home so that he could be the one to break the news to her.

5. As soon as Billy got home, he and LaJuan persuaded Andy to buy a copy of the February 1980 edition of *Hustler* so that they could look at the picture for themselves. Upon obtaining the magazine, they leafed through it and—to their shock and outrage—discovered a picture of LaJuan in the nude on page 94. The words "Photo by Husband" appeared above the photograph. The following caption also accompanied the picture: "LaJuan Wood is a 22-year-old housewife and mother from Bryan, Texas,

whose hobby is collecting arrowheads. Her fantasy is 'to be screwed by two bikers.'"

6. Neither Billy nor LaJuan ever consented to the publication of LaJuan's picture in *Hustler*. Billy did, however, take the photograph in question. In the spring of 1978 he and LaJuan went camping in Pedernales State Park. After hiking a considerable distance from the main camping area, they happened upon a pool of water in a secluded section of the park. Alone in the wilderness and hot from their walk, they peeled off their clothes and jumped into the water. After their swim, they took several pictures of each other without clothes.

7. Upon returning to College Station from the camping trip, Billy took his film to the local Fed Mart to have it developed. He testified at trial that it was his understanding that Fed Mart used a mechanical developing process, and Hustler presented no evidence to the contrary. There is nothing in the record to suggest that any Fed Mart employee ever noticed the pictures. After the prints were developed, Billy and LaJuan looked at them and then hid them under some papers in a drawer of a desk in their bedroom. They never showed the photographs to anyone. By their actions, Billy and LaJuan clearly manifested an intention to keep the photographs private. Moreover, the steps that they took to insure their privacy were reasonable.

8. Sometime after Billy and LaJuan hid the photographs, Steve Simpson, a young man who lived in their duplex, broke into their home and discovered the pictures while rifling through their things. He stole the pictures along with some other items. Later he and his wife, Kelley McConkey Simpson, sent one of the photographs of LaJuan

in the nude to Hustler. They also filled out a release form on which Kelley forged LaJuan's signature.

9. The section of *Hustler* in which LaJuan's picture appeared was called "Beaver Hunt." "Beaver Hunt," a collection of snapshots of nude models by amateur photographers, is a monthly feature of the magazine. James Heinsch, a former editor of *Hustler,* indicated that the name for the feature was selected because a beaver is a "furry critter that everyone loves." Apparently, the term is slang for pudendum.

10. Every issue of *Hustler* contains a solicitation for pictures for publication in "Beaver Hunt" and a model release form. Hustler pays $50.00 for every picture that it decides to publish.

11. Anyone wanting to submit a picture for publication in "Beaver Hunt" must send Hustler a photograph of a nude model along with a signed model release form.

12. At the time of the events that formed the basis for this lawsuit, Hustler had no formal written policy outling the procedures that members of the magazine staff were supposed to follow in investigating the validity of a release. There was, however, an unwritten understanding of what staff members were supposed to do upon receiving a photograph under consideration for publication in "Beaver Hunt." Verification of the information on the model release form was the responsibility of the magazine's research department. Working with a photocopy of the snapshot and of the release, a researcher would first attempt to reach the model by telephone. If the researcher could not get in touch with the model by telephone, he would send her a mailgram asking her to call

Hustler collect. Upon receipt of a collect call from a model, the researcher would pull the model's file and ask her a number of questions about the information on the release. The manner in which the researcher asked the questions was crucial to the verification process. He was supposed to ask the questions in a way that did not suggest a particular response. If the model did not give the same answers in the interview that she had given on the release, he was not supposed to approve the picture for publication. In addition, he was not supposed to grant approval if anything about the conversation or the release itself seemed suspicious. After initial verification of the release, an editor would write copy to accompany the photograph.

This Court has grave doubts about the adequacy of Hustler's verification process. The publication of a photograph of someone in the nude is a highly sensitive matter. The validity of the releases of "Beaver Hunt" models should be of particular concern since snapshots are not ordinarily intended for publication. Nevertheless, the verification process used by Hustler at the time provided no confirmation of the information contained in the release by an independent source. Hustler did not require notarization of the release—a requirement that might have dissuaded readers from even attempting to submit a fraudulent release. Nor did Hustler require the model to supply her social security number or driver's license number—numbers that could have been verified through independent sources. (The requirement that the model provide a social security number was added after the Simpsons sent in the fraudulent release, but before Hustler learned of the fraud. *See* P. Exh. 1, p. 98) When a researcher relied on information received from a collect

call, he did not even call back the number from which the telephone call allegedly had been made. This Court need not decide whether Hustler's verification system was adequate, however, because it concludes that the research department did not follow its own procedure in attempting to verify the validity of the release in question.

13. Although none of the witnesses who testified at trial were able to provide a completely satisfactory account of the investigation of this particular release, the Court concludes that the evidence established that the verification probably took place in the following manner. Someone from the research department sent a mailgram for LaJuan Wood to Kelley McConkey Simpson's address. On October 10, 1979 Kelley, pretending to be LaJuan, called the research department collect as the mailgram had instructed her to do. She spoke with a researcher by the name of Stephanie Ross, who handled the verification. Stephanie, however, failed to conduct the interview properly. Instead of making inquiries that did not suggest particular responses, she merely rattled off a series of yes-no questions. She also failed to investigate certain suspicious features of the release. She did not, for example, bother to find out who Kelley McConkey was, even though the release said that the prize money should be sent to her and listed the same address for her as for LaJuan. This Court finds that Kelley did not use a copy of the release to aid her in answering the questions.

The Court's conclusion that Stephanie Ross did not conduct the interview properly finds support in a number of circumstances surrounding the case. On the stand, Stephanie displayed a great deal of enthusiasm for her career and for *Hustler* magazine. While her positive at-

titude undoubtedly contributed to her ability to handle many aspects of her job well, it apparently impaired her ability to evaluate the validity of model releases. Her demeanor on the stand revealed a flippant attitude toward LaJuan's plight. She seemed to have difficulty believing that any woman could seriously object to appearing in the pages of *Hustler* even though it was her responsibility to cull the photographs of women having such feelings from the pictures submitted to "Beaver Hunt." She has been involved in the discovery conducted in this action and is familiar with the basic facts of the case, and yet she is the only person in any way connected with the case who has even hinted that LaJuan actually might have signed the release. If she is still unconvinced that the release was bogus, it would be impossible to convince her of the fraudulence of *any* release.

14. The release that the Simpsons sent to *Hustler* contained both accurate and inaccurate information. The Simpsons provided LaJuan's true name. They also correctly stated that LaJuan was a housewife and a mother, that her hobby was collecting arrowheads, and that her husband had taken the photograph. The remaining information was false. For example, the Simpsons listed their address as the Woods' address. They gave an incorrect date of birth for LaJuan and falsely asserted that she had no telephone. They concocted her sexual fantasy: "to be tied down and screwed by 2 bikers." Finally, Kelley forged LaJuan's signature on the release.

15. The Court finds that Hustler acted with reckless disregard for whether the information in the release was true and for whether LaJuan actually consented to the publication of her picture in "Beaver Hunt."

The Court also finds that Hustler published the picture of LaJuan and the accompanying copy with reckless disregard for the offensiveness of the material. Hustler knew or should have known that the publication of the material in question would be highly offensive if the proper consent had not been given. Consequently, by recklessly disregarding whether valid consent had been secured, Hustler recklessly disregarded the offensiveness of the material it published.

16. Sometime after LaJuan's picture appeared in *Hustler,* Billy accepted an offer of employment with the University of Texas at Austin. As soon as he completed his duties at Texas A. & M. for the spring semester of 1980, he and LaJuan moved to Austin. The Woods suffered no economic losses as a consequence of the move.

17. The Court finds that by publishing the picture of LaJuan in the nude, Hustler made a public disclosure of private facts, the publication of which would be highly offensive to a reasonable person of ordinary sensibilities. The Court further finds that the picture of LaJuan Wood in the nude was of no legitimate concern to the public.

18. The Court finds that by publishing LaJuan's picture in the nude, Hustler placed her in a false light. The publication of her photograph in "Beaver Hunt" indicated that she had consented to the publication since the solicitation for pictures instructs the models to fill out a release form. The publication of the sexual fantasy attributed to LaJuan also placed her in a false light since she never had such a fantasy. The false light in which LaJuan was placed would be highly offensive to a reasonable person. Furthermore, Hustler acted with reckless disregard for the falsity of the publicized matter and the

false light in which LaJuan would be placed by the publication.

19. LaJuan suffered serious damages as a result of the publication of her picture in *Hustler*. She felt humiliated, devastated, degraded, and furious. Tense and anxious, she had difficulty sleeping and sometimes felt nauseous. For the first time in her married life, serious problems developed in her relationship with Billy. The publication of the picture without her consent was an assault upon her dignity as a human being. Dr. Fred Dorn, a psychologist who testified at trial, likened her reaction to the reaction of rape victims.

Although LaJuan expressed some concern over the way that others viewed her after the picture appeared, her most serious damages did not revolve around loss of reputation. The bulk of her injury—and the injury for which this Court is compensating her—came from a blow to her self-perception. When she saw her picture in "Beaver Hunt," her inner world crumbled. To help her put it back together again, she began attending counseling sessions with Doctor Dorn, who practiced at Texas A. & M. She attended private therapy sessions once a week for six weeks. After six weeks of counseling, Doctor Dorn felt that he had done all that he could to help LaJuan. Although LaJuan is now able to cope with her life, the publication of the photograph still torments her. During the trial, she could not control her weeping.

20. The wrongful acts of Hustler proximately caused LaJuan's damages. In view of the extreme and persistent mental anguish that she suffered, this Court finds that an award of $150,000.00 would fairly and reasonably com-

pensate her for the damages that she sustained as a consequence of Hustler's invasion of her privacy.

21. The Court finds that by publicly designating Billy as the photographer of the picture in question Hustler made a public disclosure of private facts, the publication of which would be highly offensive to a reasonable person of ordinary sensibilities. Furthermore, the fact that Billy took a picture of LaJuan in the nude was not a matter of legitimate public concern.

22. The Court finds that by publicly designating Billy as the photographer of the picture in question in the context of the "Beaver Hunt" feature, Hustler placed him in a false light. The introduction to the "Beaver Hunt" that appeared in the February 1980 edition of *Hustler* urged photographers to send in snapshots with the following language: "There's nothing like the warm feeling that comes from capturing your favorite Beaver with a camera to take the chill out of these winter months. So why not get in focus and shoot your way into the pages of HUSTLER?" Because it followed this solicitation, the attribution of the photograph to Billy indicated that he had taken the picture in order to send it to Hustler for publication. The false light in which Billy was placed would be highly offensive to a reasonable person. Furthermore, Hustler acted with reckless disregard for the falsity of the publicized matter and the false light in which Bill would be placed by the publication.

23. The publication of LaJuan's picture in *Hustler* and the accompanying copy caused serious problems for Billy as well as LaJuan. Although some of Billy's damages were the result of Hustler's invasion of LaJuan's

privacy, some of his damages were the result of Hustler's invasion of his own privacy. LaJuan's suffering and humiliation were not the only source of his trauma. The designation of him as the photographer of the picture in question also caused him extreme mental anguish. He was very angry and defensive about the incident. He became tense and anxious. He even experienced feelings of physical illness. Nevertheless, because the invasion of his privacy represented a lesser intrusion than the invasion of LaJuan's privacy, he has been better able to cope with the consequences of the publication. He has not required the services of a psychologist.

24. The wrongful acts of Hustler proximately caused Billy's damages. The Court finds that an award of $25,000.00 would fairly and reasonably compensate him for the damages that he sustained as a consequence of Hustler's invasion of his privacy.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action under 28 U.S.C. § 1332.

2. In Texas a plaintiff can recover damages for invasion of privacy if he has been injured as a consequence of (1) intrusion upon his seclusion of solitude or into his private affairs or (2) public disclosure of embarassing private facts about him or (3) publicity which places him in a false light in the public eye or (4) appropriation of his name or likeness for the defendant's advantage. *See Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682 (Tex. 1976).

3. Defendant Hustler Magazine, Inc. is liable to Plaintiff LaJuan Wood for the damages proximately caused by its public disclosure of private facts about her. She is entitled to recovery because by publishing a nude picture of her in "Beaver Hunt," Hustler gave publicity to matters concerning her private life, the publication of which would be highly offensive to a reasonable person of ordinary sensibilities and because the picture was of no legitimate public concern. *Industrial Foundation,* 540 S.W.2d at 682. No Texas case has determined whether a plaintiff in a "public disclosure of private facts" action must establish that the defendant acted recklessly or whether the plaintiff need only establish negligence on the part of the defendant, but this Court need not address that question since it concludes that Hustler acted with reckless disregard for LaJuan's rights in publishing her photograph. Although failure of a publisher to properly investigate the accuracy of a matter does not constitute reckless disregard under all circumstances, this Court holds that under the circumstances of this case—involving the publication of a nude snapshot of an unknown person taken by an unknown photographer—Hustler's failure to conduct a reasonable investigation did constitute reckless disregard.

4. Defendant Hustler Magazine, Inc. is liable to Plaintiff LaJuan Wood for damages proximately caused by placing her in a false light in the public eye. LaJuan is entitled to recovery because the false light in which she was placed by the publication of the photograph and the accompanying copy would be highly offensive to a reasonable person and because Hustler acted with reckless disregard for the falsity of the publicized matter and the false

light in which she would be placed. *Gill v. Snow,* No. 2-82-056-CV, p. 3 (Tex. Ct. App.—Fort Worth Dec. 30, 1982). The publication of the photograph placed LaJuan in a false light because of the implication that she had consented to its appearance in the magazine, and the publication of the fantasy attributed to her placed her in a false light because she never had such a fantasy.

5. In view of the extreme and persistent mental anguish suffered by Plaintiff LaJuan Wood, this Court holds that $150,000.00 would fairly and reasonably compensate her for the damages proximately caused by Defendant Hustler Magazine, Inc.'s invasion of her privacy.

6. Defendant Hustler Magazine Inc. is liable to Plaintiff Billy Wood for the damages proximately caused by its public disclosure of private facts about him. He is entitled to recovery because by publicizing the fact that he had taken the picture of his wife in the nude, Hustler gave publicity to matters concerning his private life, the publication of which would be highly offensive to a reasonble person of ordinary sensibilities and because the publicized information was of no legitimate public concern. *Industrial Foundation,* 540 S.W.2d at 682. Hustler acted with reckless disregard for Billy's rights in publicly attributing the photograph to him.

7. Defendant Hustler Magazine, Inc. is liable to Plaintiff Billy Wood for the damages proximately caused by placing him in a false light in the public eye. Billy is entitled to recovery because the false light in which he was placed would be highly offensive to a reasonable person and because Hustler acted with reckless disregard for the falsity of the publicized matter and the false light in which he would be placed. *Gill v. Snow,* p. 3. The public

attribution of the photograph to Billy placed him in a false light because of the implication that he had sent the photograph to Hustler for publication.

8. Texas does not recognize a relational right to privacy. *Moore v. Charles B. Pierce Film Enterprises,* 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.). Accordingly, Billy cannot recover for damages that he sustained as a consequence of Hustler's invasion of LaJuan's privacy. He is not entitled to compensation for the anguish that he experienced because of LaJuan's humiliation and suffering. He can, however, recover for the damages caused by the invasion of his own privacy—the public attribution of the photograph to him along with the implication that he had sent the photograph to Hustler for publication. In view of the intense mental anguish suffered by Billy, this Court holds that $25,000.00 would fairly and reasonably compensate him for the damages proximately caused by Hustler's invasion of his privacy.

9. In view of the large amount of the actual damages for which Hustler is liable and in view of the absence of actual malice on the part of Hustler, this Court will exercise its discretion not to award punitive damages.

10. The invasion of privacy actions brought by Plaintiffs are governed by a two-year statute of limitations and are not time barred.

11. There is no constitutional impediment to recovery of damages by Plaintiffs in this action.

12. Although Hustler has relied on Texas law throughout the course of this lawsuit, in its post-trial brief it urges that California law applies to this case and con-

tends that the choice-of-law question is important because California would impose liability only if the defendant acted with reckless disregard for the offensiveness of the published material. In support of its contention, it directs the Court's attention to one case decided by a California court. Assuming that Hustler's statement of California law is correct, the Court notes that it need not address the choice-of-law issue since it has concluded that Hustler did indeed act with reckless disregard for the offensiveness of the published material. Accordingly, the same result would obtain whether California or Texas law applied.

13. Any finding of fact more properly characterized as a conclusion of law shall be so considered, and any conclusion of law more properly characterized as a finding of fact shall be so considered.

Signed this 1st day of March, 1983.

/s/ Robert O'Conor, Jr.
United States District Judge

APPENDIX B

WOOD v HUSTLER MAGAZINE, INC.

Lajuan and Billy WOOD,

Plaintiffs-Appellees,

v.

HUSTLER MAGAZINE, INC.,

Defendant-Appellant.

No. 83-2280.

United States Court of Appeals,
Fifth Circuit.

July 28, 1984.

Plaintiff and her husband brought action against magazine, alleging invasion of her privacy by its publication of stolen photograph, depicting her in the nude, that was submitted to magazine with forged consent form. The United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., entered judgment in favor of plaintiff and her husband, and magazine appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) Texas law applied to case; (2) two-year Texas statute of limitations governing actions "for injury done to the person of another" was applicable, and action was thus not time barred, (3) magazine was properly held liable for actual damages for negligently placing plaintiff in offensive false light; (4) husband was not entitled to damages under invasion of privacy theory; and (5) actual damages awarded plaintiff in amount of $150,000 were not excessive.

Affirmed in part and reversed in part.

1. Federal Courts—409

Sitting in diversity, federal court follows conflict-of-law rules of forum state.

2. Torts—2

Where plaintiffs in action alleging invasion of privacy by publication of stolen nude photograph in magazine were Texas residents, injury occurred in Texas, and relationship of parties was centered in Texas, federal district court properly applied Texas law, including Texas statute of limitations, notwithstanding that defendant magazine was California corporation and that California was place where conduct causing injury occurred.

3. Limitation of Actions—31

Under Texas law, action for invasion of privacy by publication of stolen nude photograph in magazine was governed by two-year statute of limitations governing actions "for injury done to the person of another," rather than one-year limitations period applicable to actions "for injuries done to the character or reputation of another by libel or slander." Vernon's Ann. Texas Civ.St. arts. 5524, subd. 1, 5526, subd. 3.

4. Torts—8.5(5)

Under Texas law, plaintiff whose privacy has been invaded can have only one recovery if alternative causes of action contain identical elements of damages flowing from same publication.

5. Torts—8.5(3, 6)

Under Texas law, magazine publisher could be held liable for actual damages for negligently placing private

figures in offensive false light, in regard to private figures, showing of reckless disregard was not required.

6. Torts—8.5(6)

Magazine which placed plaintiff in offensive false light by publishing stolen nude photograph of her was properly held liable to plaintiffs for actual damages for invasion of privacy under Texas law, in light of its careless administration of slipshod procedures to verify that actual person shown in photograph had consented to publication.

7. Torts—20

Under Texas law, plaintiff cannot recover for injury caused by invasion of another's privacy.

8. Torts—20

Under Texas law, husband was not entitled to recover under invasion of privacy theory against magazine which negligently published stolen nude photograph of his wife, as any understandable suffering on part of husband was not caused by invasion of his right of privacy.

9. Damages—130(1)

Award of $150,000 against magazine which negligently published stolen nude photograph of plaintiff was not excessive.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, RUBIN and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

Hustler Magazine invaded LaJuan Wood's privacy by publishing a stolen photograph, depicting LaJuan in the nude, that was submitted with a forged consent form. Although Texas courts have begun to flesh out the contours of the privacy cause first recognized in *Billings v. Atkinson*, 489 S.W.2d 858 (Tex.1973), they have not resolved issues critical to our disposition of this diversity case. We must determine the applicable statute of limitations for privacy actions as well as the level of fault required to impose liability for actual damages on a publisher who places a private figure in a false light. The case was tried to the bench. The district court held that the cause was not barred by limitations, that Hustler invaded the Woods' privacy by publishing the photograph without adequately verifying the truth of the consent form, and that she and her husband Billy were damaged in the amounts of $150,000 and $25,000, respectively. We affirm the judgment for LaJuan, but reverse the judgment for her husband.

I. Facts

LaJuan and Billy Wood went camping in a state park. While walking alone in a wilderness area, they became hot, disrobed, and went swimming in a river. Later they took several photos of each other in the nude. After returning home, Billy submitted the roll of film to an establishment that employed a mechanical developing process. They treated the photographs as private material, not showing them to anyone else and keeping them out of view in a drawer in their bedroom. One day, Steve Simpson, who resided in the other side of the Woods' duplex, broke into the Woods' home and stole some of the photos. Simpson and Kelley Rhoades, who was then his wife, decided to submit a nude photo of LaJuan to Hustler for publication

in its "Beaver Hunt" section. Accordingly, they filled out a consent form that requested personal information. Some of the information was true, such as LaJuan's identity and her hobby of collecting arrowheads. Other information was false, such as LaJuan's age and address and a fantasy of being "tied down and screwed by two bikers." Kelley forged LaJuan's signature and they mailed the photograph and consent form to Hustler in California.

Hustler's "Beaver Hunt" section featured nude photographs, typically sent in by Hustler readers, of nonprofessional female "models." If a submitted photo was selected for publication, the model would receive a $50 fee. Although Hustler had maintained its "Beaver Hunt" section for some time, it did not have a written policy or procedure for verifying the accuracy of information and signatures contained in the consent forms when a photograph was to be published. Hustler's informal policy, however, was to call the telephone number listed in the consent form and ask whomever claimed to be the model nonleading questions designed to elicit responses that would confirm information in the consent form. If no telephone number was listed, Hustler would send a mailgram or telegram to the address shown for the model, requesting that Hustler be called collect. If either the consent form itself or the responses during verification caused Hustler to become suspicious, or if the model had developed doubts about appearing nude in print, Hustler was supposed to place the model's entry into a "Never to Run" category.

When the Hustler staff considered LaJuan's photo for publication, some employees thought that the name, "LaJuan Wood" was a play on words. In the photograph LaJuan was sitting on a horizontal portion of a tree trunk,

creating the impression that "LaJuan Wood" was an alteration of "Lay You on Wood." "LaJuan"'s consent form did not list a telephone number, but provided that the $50 check be sent in Kelley's name to LaJuan's purported address. After Hustler selected LaJuan's photo, Kelley received a mailgram addressed to LaJuan and called Hustler. A Hustler staff member asked Kelley a series of leading questions, answerable by "yes" or "no," in a conversation that lasted only one or two minutes.

Hustler published LaJuan's photo in the February 1980 issue of Hustler with the caption, "Photo by Husband." The accompanying copy read, "Lajuan Wood is a 22-year old housewife and mother from Bryan, Texas, whose hobby is collecting arrowheads. Her fantasy is 'to be screwed by two bikers.'" Two other photos were on the same page against a background that resembled a bathroom-tile floor. The tip of a bare left foot appeared at the bottom of the page.

LaJuan and Billy first learned of the publication from friends. Although LaJuan initially did not believe that a photo of her had been published, the Woods confirmed the publication by obtaining a copy of the magazine. LaJuan suffered mental anguish and humiliation after learning of the inclusion of her photo in Hustler. She received a series of obscene telephone calls after the magazine appeared. To help her in dealing with her feelings of degradation and embarrassment, LaJuan required psychological counseling, which extended over a six-week period.

LaJuan and Billy sued Hustler for defamation and for invasion of privacy on two theories—publication de-

picting the subject in a false light highly offensive to a reasonable person and public disclosure of private facts not of legitimate public concern and highly offensive to a reasonable person. The district court determined that the law of Texas, not California, applied. Although the Woods' defamation cause was time-barred by article 5524, Tex.Rev.Civ.Stat.Ann. (Vernon 1958) (one year), the district court held that the privacy causes was governed by the two-year limitations period of article 5526. Holding that Hustler had invaded the Woods' privacy both by publicly disclosing private facts in an offensive manner and by placing them in an offensive false light, the court awarded $150,000 in compensatory damages to LaJuan and $25,000 in compensatory damages to Billy. The court found that Hustler invaded Billy's privacy less intrusively and that some of his anguish was attributable to the invasion of his wife's privacy. Texas does not recognize a relational or derivative right of privacy. *See Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex.Civ.App.—Texarkana 1979, writ ref'd n.r.e.).

II. Choice of Law

Hustler argues that California substantive law applies to this case. *See, e.g., Briscoe v. Reader's Digest Ass'n*, 4 Cal.3d 529, 93 Cal.Rptr. 866, 483 P.2d 34 (1971) (en banc). The principal reason that Hustler urges application of California law is its shorter, one-year statute of limitations that applies to invasion of privacy actions. *See* Cal.Civ.Proc.Code § 340(3) (West 1982 & Supp.1984). Hustler assumes that California's governing statute of limitations is substantive and that Texas would be required to apply California's limitations period if Cal-

ifornia had the most significant relationship to the parties and the dispute.

[1] Sitting in diversity, we follow the conflict-of-law rules of Texas, the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). In *Gutierrez v. Collins,* 583 S.W.2d 312 (Tex.1979), the Texas Supreme Court adopted the "most significant relationship" test of the Restatement (Second) Conflict of Laws (1969). Section 6 of the Restatement recites general principles, and section 145 lists the contacts to be considered in applying section 6 to evaluate the significance of the relationship of a state's law to the parties, the issue, and the occurrence, ultimately to decide which law to apply.

[2] The district court properly applied Texas law. Under section 145 of the Restatement, the contacts of Texas predominate: the injury occurred in Texas, the relationship of the parties was centered in Texas, and the plaintiffs' residence was in Texas. "In situations involving the multistate publication of matter that . . . invades his right of privacy (see § 153), the place of the plaintiff's domicil . . . is the single most important contact for determining the state of the applicable law." Restatement (Second) Conflict of Laws § 145 comment f (1969). The only contacts pointing to California are the defendant's place of business and the place where the conduct causing injury occurred. Because Texas has the most significant relationship to this litigation, Texas substantive law applies. We need not address whether California's statute of limitations is substantive or procedural. Texas courts, applying Texas substantive law,

would clearly apply a Texas limitations period. *See Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1111-12 (5th Cir.1981).

III. Statute of Limitations

[3] Hustler contends that article 5524(1), Tex.Rev. Civ.Stat.Ann. (Vernon 1958), which provides a one-year limitations period for actions "for injuries done to the character or reputation of another by libel or slander," applies to invasion of privacy causes of action. The district court applied the two-year statute of limitations of article 5526(3), Tex.Rev.Civ.Stat.Ann. (Vernon Supp. 1984), which governs actions "for injury done to the person of another." The Woods filed suit approximately a year and two weeks after the February 1980 issue of Hustler was published. If the district court erred by applying article 5526, the Woods would be barred from obtaining a remedy, and we would reverse. We hold, however, that the district court properly applied the two-year limitations period of article 5526 to privacy causes.

In the relatively short time since Texas recognized a cause of action for invasion of privacy, Texas courts have not had occasion to decide which limitations period applies. *See generally,* Comment, *The Privacy Action in Texas: Its Characterization, and a Determination of Applicable Statutes of Limitations,* 29 Sw.L.J. 928 (1975). Thus, we must predict how Texas courts would resolve the issue.

Dean Prosser formulated the four distinct torts encompassed under the category of invasion of the right of privacy. *See* W. Prosser, *Handbook of the Law of*

Torts § 117 at 802-18 (4th ed. 1971); Prosser, *Privacy,* 48 Calif.L.Rev. 383 (1960). The American Law Institute later adopted these four types of privacy invasions in the Restatement (Second) of Torts. *See* Restatement (Second) of Torts §§ 652A, 652B, 652C, 652D & 652E (1976). Texas courts recognize these four forms of privacy invasion. *See Braun v. Flynt,* 726 F.2d 245, 252 (5th Cir. 1984); *Industrial Foundation of the South v. Texas Industrial Accident Board,* 540 S.W.2d 668, 682 (Tex.1976); *Gill v. Snow,* 644 S.W.2d 222, 223-24 (Tex.App.—Ft. Worth 1982, no writ). Each of the four, distinct privacy torts is based on different elements. They are related because "each involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others." Restatement (Second) of Torts § 652A comment b (1976).

Hustler urges that we apply the one-year statute of limitations governing defamation actions to bar the Woods' remedy, primarily because of the similarity of a "false light" privacy action to defamation. We acknowledge the kinship of defamation to a false light claim, but we see them as distinct torts involving different injuries. Although Hustler's publication of LaJuan's photograph with the accompanying copy was actionable under either a defamation or a false light theory, the false light tort is broader than defamation. In his seminal law review article, Dean Prosser described the interest invaded by placing plaintiff in a false light as "that of reputation, with the same overtones of mental distress as in defamation." Prosser, *supra,* 48 Calif.L.Rev. at 400. Nevertheless, we have recently noted that different interests are

invaded by the two torts, despite the similarities of false light invasion of privacy to defamation. *See Braun v. Flynt,* 726 F.2d 245, 250 (5th Cir.1984) (applying Texas law). "[T]he principal element of injury in a defamation action is impairment of reputation, while an invasion of privacy claim is founded on mental anguish. . . ." *Id.; see Rinsley v. Brandt,* 700 F.2d 1304, 1307 (10th Cir.1983). The statute of limitations governing defamation is expressly limited to those actions to remedy "injuries done to the *character* or *reputation* of another" (emphasis added).

Speaking generally of injury caused by the invasion of privacy, the Texas Supreme Court has described it as mental suffering and mental and subjective injury. *Billings v. Atkinson,* 489 S.W.2d 858, 861 (Tex. 1973). *See National Bonding Agency v. Demeson,* 648 S.W.2d 748, 750 (Tex. App.—Dallas 1983, no writ). Moreover, the *Billings* court quoted a description of the invasion as an "encroachment upon the personality of the individual." *Billings,* 489 S.W.2d at 860. The court also stressed the separate nature of the privacy tort. "The right of privacy is a right distinctive in itself and not incidental to some other recognized right for breach of which an action for damages will lie." *Id.* at 861.

The privacy tort of public disclosure of highly offensive private facts more clearly invades personality than reputation. "[W]hat is involved in a privacy case is not damage to reputation but primarily emotional disturbance." Wade, *The Communicative Torts and the First Amendment,* 48 Miss.L.J. 671, 707-08 (1977); *see* Nimmer, *The Right to Speak from* Times *to* Time: *First Amend-*

ment Theory Applied to Libel and Misapplied to Privacy, 56 Calif.L.Rev. 935, 958 (1968).

We do not think that the Texas Supreme Court would apply a one-year limitations period to a false light privacy action, while applying a two-year period to the tort of publicizing private facts, which more clearly does not substantially involve damage to reputation or character. Rather, we think that, in the absence of direction by the Texas legislature, Texas courts would apply the two-year limitations period of article 5526 to both privacy torts because they involve injury to the person. We are aided by *Whitley v. Whitley,* 436 S.W.2d 607 (Tex.Civ.App.—Houston [14th District] 1968, no writ), where an action for alienation of affections was held to be governed by article 5526. The court noted that article 5526 had been applied to other actions for mental suffering, anguish, and sorrow and affliction. Because the loss of consortium involved losses "of a mental and emotional nature," the court held that they were "embraced within the term 'injury done to the person of another.'" *Id.* at 609. Likewise, the injuries caused by Hustler's publication of La-Juan's nude photo are of a mental and emotional nature.

We also note that Texas courts construe statutes of limitations strictly, requiring that an action be specifically excepted in order to avoid application of the general statute of limitations. *See Robin v. Ely & Walker Dry Goods Co.,* 137 S.W.2d 164, 167 (Tex.Civ.App.—Austin 1940, writ ref'd n.r.e.); *Pillow v. McLean,* 91 S.W.2d 898, 899-90 (Tex. Civ.App.—Amarillo 1936) ("statute of limitations is considered as intended to embrace all causes of action not specially excepted from its operation"), *aff'd,* 131 Tex. 539, 117 S.W.2d 57 (1938); Comment, *supra,* 29 Sw.L.J.

at 940, 947-48. Therefore, we hold that the Woods' privacy claims are governed by the general two-year statute of limitations applicable to actions for injury to the person, and are not time-barred.

IV. Hustler's Liability for Placing LaJuan in a False Light

In this appeal we are concerned with the two forms of privacy invasion that share the element of publicity—false light and disclosure of private facts. *See* Restatement (Second) of Torts § 652A comment d & illustration (1976). Hustler's primary challenge to its liability focuses on the standard of care. Hustler argues that the First Amendment requires, at a minimum, that a publisher must act in reckless disregard of the falsity and the offensiveness of material before it can be liable for invasion of privacy by placing an individual in a false light. Hustler claims that it did not publish in reckless disregard, because it did not know of or did not have serious doubts about the falsity of the consent form.

The district court, guided by language in *Gill v. Snow*, 644 S.W.2d 222 (Tex.App.—Ft. Worth 1982, no writ), assumed that publishing with reckless disregard was a required element of a false light claim and found that Hustler acted in reckless disregard of the falsity of the published material and of the false light in which LaJuan would be placed. Noting that no Texas court had established a standard of care for a private facts case, the district court did not address the question because it found that Hustler published the photo of LaJuan with reckless

disregard for her right to be free from publication of a matter that would be highly offensive to a reasonable person. The district court found that Hustler was liable for invasion of LaJuan's privacy under either theory. Under the false light theory, Hustler's publication falsely represented that LaJuan consented to the submission and publication in a coarse and sex-centered magazine of a photograph depicting her in the nude. Moreover, the publication falsely attributed a lewd fantasy to LaJuan. Under public disclosure of private facts, Hustler gave publicity to the highly private fact of LaJuan's nude appearance, the publication of which, absent her consent, would be highly offensive to a reasonable person and was not of legitimate public concern.

[4] The fault under each theory was Hustler's publication without LaJuan's consent. The central inquiry concerning Hustler's liability focuses on its procedure for verifying the truth of consent forms submitted with photographs for publication in the Beaver Hunt section.[1] Although the district court did not specifically link LaJuan's recovery to one of the two privacy causes, we infer that she recovered on the false light theory because some of her damages resulted from publication of the

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1. If LaJuan had truly consented to the publication and submitted personal information on the consent form, she would not have been placed in an offensive false light nor would publicity have been given to her private life in an offensive manner. Hustler would have an absolute privilege because of her consent. See Restatement (Second) of Torts § 652F comment b (1976).

false and highly offensive fantasy.[2] This component of damages could not have been awarded under the private facts theory because the fantasy did not truthfully reflect LaJuan's private life. *See* Restatement (Second) of Torts, § 652D & comments a & b (1976); *id.* § 652E comment b (1976). Therefore, we address the standard of care applicable to a media defendant who invades a private figure's privacy by placing that person in a false light. Hustler does not dispute that LaJuan was and remains a private figure.

A. Standard of Care

The Supreme Court first enunciated the actual malice standard in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), a defamation case. The Court held that, to comply with the First and Fourteenth Amendments, states could not impose liability on a defendant who published defamatory matter concerning a public official unless the publisher knew of the falsity of the matter or acted in reckless disregard for its truth or falsity. The Court later applied the prevailing constitutional standard to false light privacy actions in *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). The Court noted that it applied the *New York Times* actual malice requirement in the discrete context of a statutory privacy action brought by a private individual who

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2. A plaintiff whose privacy has been invaded can have only one recovery if alternative causes of action contain identical elements of damages flowing from the same publication. *See Braun v. Flynt,* 726 F.2d 245, 250-51 (5th Cir.1984); *Holloway v. Butler,* 662 S.W.2d 688, 690 (Tex. App.—Houston [14th District] 1983, writ ref'd n.r.e.) (adopting Uniform Single Publication Act); Restatement (Second) of Torts § 652A comment d & illustration (1976).

was involved in a matter of public interest. In a divided opinion, the Court later required private figures in defamation actions to prove actual malice if the published material was a matter of public or general concern. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

The Court substantially altered the direction of First Amendment law in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). *See generally*, Wade, *The Communicative Torts and the First Amendment*, 48 Miss.L.J. 671, 692-97 (1977); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex.L.Rev. 199 (1976). Abandoning *Rosenbloom's* focus on whether defamatory matter was a matter of public concern, the *Gertz* Court established a public figure-private figure dichotomy. *See Braun v. Flynt*, 726 F.2d at 249 & n. 6. Defendants who published statements concerning public figures were entitled to heightened protection because (1) the press required "breathing space" in conveying information about public figures; (2) public figures could be said, in some sense, to have sought out or volunteered for notoriety or public discussion, and (3) public figures had access to media in which they could respond to and attempt to correct false statements. By contrast, the states had a greater interest in protecting private figures who had not "invite[d] attention and comment" and who generally "lack effective opportunities for rebuttal." *Id.* at 344, 94 S.Ct. 3009. The Court held that, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private in-

dividual." *Id.* at 347, 94 S.Ct. at 3010. After *Gertz,* states were permitted to establish negligence as a standard of care in defamation actions by private plaintiffs so long as the recovery was limited to actual damages. To recover punitive damages, however, private plaintiffs were required to satisfy the *New York Times* actual malice standard. Most state courts considering the question in the wake of *Gertz* adopted negligence as the minimum standard of liability required by the Constitution for defamation actions by private plaintiffs. *See Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809, 819 (Tex.1976), *cert. denied,* 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977); *Mathis v. Philadelphia Newspapers, Inc.,* 455 F. Supp. 406, 412 n. 2 (E.D.Pa.1978); Wade, *supra,* 48 Miss. L.J. at 706.

B. Texas Law

In *Foster,* the Texas Supreme Court held that

> a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false.

Foster, 541 S.W.2d at 819. The court also noted that, as a predicate for liability, the content of the false statement must "warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.* at 819-20 (quoting *Gertz,* 418 U.S. at 348, 94 S.Ct. at 3011).

No Texas court has set forth the standard of care applicable to publishers who invade the privacy of a person,

public or private, by placing him in a false light.[3] Therefore, *Erie* requires us to make our own conclusion as to the standard of care that the Texas Supreme Court would require to hold a publisher liable for placing a private plaintiff in a false light. *See Bryan v. Kershaw*, 366 F.2d 497, 500-01 (5th Cir. 1966), *cert. denied*, 386 U.S. 959, 87 S.Ct. 1030, 18 L.Ed.2d 108 (1967); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507 (1982). Texas intermediate appellate courts have indicated that they would generally follow the guidelines of the Restatement (Second) of Torts. *See Gill*, 644 S.W.2d at 224; *Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex.Civ.App.—Texarkana 1979, writ ref'd n.r.e). On the particular issue of standard of care under false light, however, the Restatement qualifies its actual malice standard with a caveat. *See* Restatement (Second) of Torts § 652E caveat & comment d (1976). Comment d notes that, in view of *Gertz*, the caveat leaves open the possibility that liability may be based on a showing of negligence as to truth or falsity: "If Time v. Hill is modified along the lines of Gertz v. Robert Welch, then the reckless-disregard rule would apparently apply if the

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3. The Texas Court of Civil Appeals affirmed a judgment based on invasion of privacy in *National Bonding Agency v. Demeson*, 648 S.W.2d 748 (Tex.App.—Dallas 1983, writ ref'd n.r.e.). The court, however, did not distinguish among three possible theories—intrusion into seclusion, public disclosure of private facts, and placing in a false light, *id.* at 749 n. 2, nor did the court evaluate the applicable standard of care, aside from nothing that the jury found that the appellant had acted with malice. *Id.* at 751. In *Gill v. Snow*, 644 S.W.2d 222 (Tex. App.—Ft. Worth 1982, no writ), the court considered a false light claim, but did not rule on the applicable standard of care because "no false statements of fact were ever published . . ." *Id.* at 224.

plaintiff is a public official or public figure and the negligence rule will apply to other plaintiffs. Restatement (Second) of Torts § 652E comment d at 399.

We are convinced that a Texas court would apply no different standard of care to a false light claim than it would to a defamation action. We note that the principal justification in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), for applying the actual malice standard to a private figure was the subject of the published material—a matter of public concern. *Gertz*, however undermines the authority of *Hill*. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 498 n. 2, 95 S.Ct. 1029, 1048 n. 2, 43 L.Ed.2d 328 (Powell, J., concurring). Rather than asking if the publication is newsworthy or concerns a public issue to determine if the actual malice standard applies, *Gertz* requires that courts inquire into the type of damages (actual or punitive) and the type of plaintiff (private or public) involved in a case. *See Braun v. Flynt*, 726 F.2d at 249 & n. 6. Soon after *Gertz* was decided, the Court considered *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S.Ct. 465, 42 L.Ed.2d 419 (1974), a false light case. The Court there said. "this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a falselight theory of invasion of privacy . . . . " *Id.* at 250, 95 S.Ct. at 469. The Court left the question open because no party objected to the jury instruction, which stated that a finding of actual malice was required before the publisher could be held liable. *Id.*

This circuit, however, applying Texas law in a recent false light case, helps decide the constitutional question.

In *Braun v. Flynt,* 726 F.2d at 249, the court held that the defendant, who placed a private figure in a false light, was not entitled to the constitutional protection afforded publishers by application of actual malice as a standard of liability. The court went on to affirm the jury's finding of actual malice, however, because of the punitive damages in the case. *Id.* at 256-57. In light of *Braun,* we hold that *Gertz* applies equally to false light and defamation cases, and that states are permitted, consistent with the First and Fourteenth Amendments, to impose liability for actual damages on publishers who negligently place private figures in an offensive false light. Courts and commentators have agreed with this conclusion. *See Fitzgerald v. Penthouse International, Ltd.,* 525 F.Supp. 585, 602-03 (D.Md.1981) (dictum), *aff'd,* 691 F.2d 666 (4th Cir. 1982); *Dresbach v. Doubleday & Co.,* 518 F.Supp. 1285, 1288-92 (D.D.C.1981); J. Nowak, R. Rotunda & J. Young, *Constitutional Law* at 787 (1978); Wade, *supra,* 48 Miss. L.J. at 707; Hill, *Defamation and Privacy Under the First Amendment,* 76 Colum.L.Rev. 1205, 1274 & n. 321 (1976); Note, *Right of Privacy—Availability of Injunctive Relief for Invasions of Privacy,* 39 Mo.L.Rev. 647, 657 (1974).

[5] We think that Texas courts would apply the negligence standard of liability enunciated in *Foster v. Laredo Newspapers, Inc.,* 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied,* 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977), to false light privacy actions brought by private plaintiffs seeking actual damages. Accordingly, we need not evaluate the evidence of Hustler's awareness or acts while verifying the forged consent form against the stringent, subjective standard of reckless disregard set forth in *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct.

1323, 20 L.Ed.2d 262 (1968),[4] and in *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71, 84-85 (Tex.App.—Ft. Worth 1982, writ ref'd n.r.e.).

[6] Under the *Foster* negligence standard the record prominently shows that Hustler carelessly administered a slipshod procedure that allowed LaJuan to be placed in a false light in the pages of Hustler Magazine. The nature of material published in the Beaver Hunt section would obviously warn a reasonably prudent editor or publisher of the potential for defamation or privacy invasion if a consent form was forged. The wanton and debauched sexual fantasies and the intimate photos of nude models were of such a nature that great care was required in verifying a model's consent.

In verifying the forged consent form sent with LaJuan's picture, Hustler did not even follow its own questionable procedure. The district court found that, during a brief telephone conversation, a Hustler research assistant merely asked a few leading questions of the same person who submitted the forged consent form. James Heinsch, who was Hustler's managing editor for the February 1980 issue, testified that verifying by asking leading questions was a breach of Hustler's verification policy.

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4. The reckless disregard aspect of the *New York Times* actual malice test

> is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731, 88 S.Ct. at 1325.

Hustler also claimed that its policy was to throw out or place in a "Never to Run" category photos and consent forms that gave rise to suspicions concerning their accuracy. The Hustler staff, however, did not question the accuracy of the name, "LaJuan Wood," even after employees suspected that it was a pseudoynm. The fact that the $50 check was to be sent to a person other than LaJuan at what was alleged to be LaJuan's address also did not trigger an inquiry.

The verification procedure was deficient even when Hustler followed it. When LaJuan's photo was published, Hustler did not require the submission of a social security number or a driver's license number, from which Hustler could easily have verified its source. Nor did Hustler require notarization of the consent form. Another flaw in the verification procedure was exposed in cases where the model did not list a home telephone number. If such a model's photo was selected, the model would call Hustler after she had received a mailgram. A "model" engaged in a fraud would know that she was calling Hustler, and would be prepared to answer questions that confirmed the information she submitted. Because Hustler did not call back as an additional safeguard, the "model" could call from any undisclosed telephone number. At least when Hustler called a number listed on the form it would have an element of surprise. By asking for a model by name, Hustler would probably get that person on the phone before she knew Hustler was the caller and, in a case of fraud, before she was prepared to supply false answers. Hustler acted negligently.

Because we affirm the judgment for LaJuan on the false light theory, we need not address Hustler's liability

for publicly disclosing the highly private, but truthful, fact of her nudity.

V. Invasion of Billy's Privacy

The district court found that Hustler invaded Billy's privacy by publishing the caption "photo by husband" along with the photo of LaJuan. The court determined that the fact that Billy took photos of his wife in the nude would be highly offensive to a reasonable person. By disclosing this fact, the district court found that Hustler invaded Billy's privacy. The court also found that the caption placed Billy in an offensive false light because it indicated that he had taken the picture for publication in Hustler's Beaver Hunt section.

Hustler argues that Billy's privacy was not invaded because the fact that he photographed his wife in the nude was not private and that a reasonable person would not find it highly offensive. Moreover, Hustler contends that the caption was accurate and that Billy was not placed in a false light. It argues that models are the persons who typically submit photos and that it would be unreasonable to infer that the photographer submitted the photo for publication in Hustler.

[7, 8] We need not address these contentions because we agree with Hustler on another issue. The district court was clearly erroneous in finding that Billy suffered mental anguish for the invasion of his privacy. Texas does not permit a plaintiff to recover for injury caused by the invasion of another's privacy. *See Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex.Civ.App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F.Supp. 145 (N.D.

Tex.1979); Restatement (Second) of Torts § 652I (1976). We do not doubt that Billy suffered as a result of LaJuan's injury. The record, however, shows no evidence of any mental anguish or suffering caused by any invasion of Billy's right of privacy. Indeed, Billy testified that he was not injured and that his anger stemmed from the tension and pressure created within his family as a result of the publication. Billy attributed these feelings to his concern for the effect that the publication had and would have on his wife. We therefore reverse the district court's judgment for Billy.

VI. Damages

[9] Hustler argues that the $150,000 damages award to LaJuan was the result of passion and prejudice and that it exceeds the amount supported by the evidence. We disagree. The record contains no evidence that the district court was prejudiced or awarded punitive damages in the guise of actual damages. Moreover, after examining the record, we are convinced that the award of damages is not "beyond the maximum possible award supported by the evidence. . . ." *Keyes v. Lauga,* 635 F.2d 330, 336 (5th Cir.1981). *See Melanson v. Turner,* 436 S.W.2d 197 (Tex.Civ.App.—Ft. Worth 1968, no writ).

AFFIRMED in part, REVERSED in part.

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ Della M. Jones
Deputy
New Orleans, Louisiana
October 9, 1984

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2280

LAJUAN and BILLY WOOD,

Plaintiffs-Appellees,

versus

HUSTLER MAGAZINE, INC.

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed September 11, 1984)

(Opinion July 23, 1984, 5 Cir., 198—, — F.2d —)
(September 11, 1984)

Before GOLDBERG, RUBIN and REAVLEY, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges

who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Norman M. Ready
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-645

In The

Supreme Court of the United States

October Term, 1984

HUSTLER MAGAZINE, INC.,

Petitioner-Defendant,

vs.

LAJUAN and BILLY WOOD,

Respondents-Plaintiffs.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit decided the case below correctly and consistently with this Court's decisions and the guarantees of free speech and press embodied in the First Amendment?

2. Whether the Court should undertake a *de novo* review of the facts on writ of certiorari when the record establishes an invasion of privacy with convincing clarity?

PARTIES TO THE PROCEEDING BELOW

The Plaintiffs-Respondents are LaJuan and Billy Wood.
The Defendant-Petitioner is Hustler Magazine, Inc.

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Respondents-Plaintiffs.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

REFERENCE TO OPINIONS

The Judgment, Findings of Fact, and Conclusions of Law of the United States District Court for the Southern District of Texas, Houston Division, dated March 1, 1983, were not reported and are reproduced as Appendix A in

the petition already filed with the Court by Defendant-Petitioner, Hustler Magazine, Inc.

The original opinion of the United States Court of Appeals for the Fifth Circuit is reproduced in Appendix B of the petition filed by Defendant-Petitioner, Hustler Magazine, Inc.

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JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on July 23, 1984, and Rehearing En Banc was denied on September 11, 1984.

Defendant-Petitioner alleges that jurisdiction of this Court is based upon 28 U.S.C. Section 1254(1).

———o———

STATEMENT OF THE CASE

In the February 1980 issue of *Hustler* Magazine, Defendant-Petitioner published a nude photograph of LaJuan Wood without her consent. (Tr. Vol. I, pp. 12-13). That photograph appeared in a section of the magazine entitled "Beaver Hunt," along with a false, fabricated sexual fantasy. (Plaintiff's Exhibit 1, p. 94). At the time of publication Mrs. Wood was a housewife, mother and student at Texas A & M University where her husband, Billy Wood, taught engineering design graphics. (Tr. Vol. I, pp. 7, 34). Billy and LaJuan Wood were living in Bryan, Texas, a small town where Mrs. Wood had lived since she was six years old. (Tr. Vol. I, p. 7).

The photograph in question was actually taken by Mr. Wood in 1978 while the couple was swimming in a secluded

portion of Pedernales Falls State Park, near Dripping Springs, Texas. (Tr. Vol. I, p. 12). The photographs were developed at a Fed Mart store in Bryan, Texas upon the Woods' return trip home with the understanding of Mr. and Mrs. Wood that Fed Mart, used a mechanical process, and that no one saw or knew of the pictures except the Woods. (Tr. Vol. I, pp. 13-14). Billy Wood brought the photos home and put them under some papers in a bedroom drawer. (Tr. Vol. I, p. 13).

The Woods' home was then burglarized by Steve Simpson, who stole the photographs of Mrs. Wood. (Tr. Vol. II, p. 13). Simpson and his wife, Kelley McConkey Simpson (now Kelley Rhoades), sent one of the photos to Hustler, along with a forged consent form. (Tr. Vol. II, pp. 6-7, 14-16). They falsified Mrs. Woods' address, birthdate, and sexual fantasy. ("to be tied down and screwed by two bikers.") (Tr. Vol. II, pp. 14-16). They did not list a telephone number. (Defendant's Exhibit 9).

The photograph and consent form were subsequently received by Hustler which did not have a formal written policy outlining verification procedures. (Tr. Vol. II, p. 137). The informal policy consisted of sending a mailgram to the address listed on the release if no telephone number appeared on the release. (Tr. Vol. II, p. 100). The person receiving the mailgram would then call collect and answer questions about the release form. (Tr. Vol. II, p. 100). Hustler never verified the release by independent sources such as driver's license number or social security number. (Tr. Vol. II, pp. 133-145).

The mailgram was sent to "LaJuan Wood" at Kelley McConkey Simpson Rhoades' mother's house, and Kelley Rhoades called Hustler collect, leaving a fictitious phone

number and representing herself as LaJuan Wood. (Tr. Vol. II, pp. 32-37). Rhoades apparently spoke with Stephanie Ross for only two minutes, who asked her a series of leading yes-no questions.(Tr. Vol. II, pp. 32-37). The picture was then approved for publication, even though Mrs. Rhoades asked that the check for $50.00 be sent to Kelley McConkey at the address listed on the release as LaJuan Wood's.[1] (Tr. Vol. II, pp. 37-38).

Mrs. Wood's photograph then appeared in the section of *Hustler* Magazine entitled "Beaver Hunt", along with the designation "Photo by Husband" and the false sexual fantasy. (Plaintiff's Exhibit 1, p. 94). LaJuan and Billy Wood did not learn of the publication until a friend stopped by to tell them he had heard that LaJuan's picture was in *Hustler* Magazine. (Tr. Vol. I, pp. 9-11). Another friend called Mr. Wood at work that afternoon and confirmed the fact of the publication. (Tr. Vol. I, p. 11).

What followed was a period of severe anxiety and mental anguish for both LaJuan and Billy Wood. Mrs. Wood felt degraded, embarrassed, hurt, and angry. (Tr. Vol. I, pp. 20-21). She received three to four obscene phone calls per day. (Tr. Vol. I, p. 29). The Woods had marital difficulties because of the publication, and Mrs. Wood's reaction was so strong that she required psychological counseling. (Tr. Vol. I, pp. 26-29). Her psycholo-

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[1] The District Court found that Hustler published the photograph and accompanying text with reckless disregard for the truth or falsity of the material, and that "Hustler published the picture of LaJuan and the accompanying copy with reckless disregard for the offensiveness of the material." (Findings of Fact 13-15). The District Court also expressed grave doubts about Hustler's "verification procedure", and found that Hustler *failed even to follow its own procedure*. (Findings of Fact 12-13).

gist likened her reaction to that of a rape victim, in that she felt anger, frustration, and a sense of helplessness. (Tr. Vol. I, p. 104). There was uncontradicted evidence that LaJuan Wood's reaction, problems, and fears will continue into the future. (Tr. Vol. I, p. 97).

LaJuan and Billy Wood brought suit against Hustler on January 23, 1981, alleging libel and invasion of privacy. (Plaintiff's Original Complaint, R.A. 430). After a trial to the Court, judgment was entered on March 1, 1983, for Mrs. Wood in the amount of $150,000.00 and for Mr. Wood in the amount of $25,000.00 for invasion of privacy by placing them in a false light in the public eye and for public disclosure of private facts. (R.A. 20-38).

The United States Court of Appeals for the Fifth Circuit affirmed the judgment as to Mrs. Wood on the basis of false light invasion of privacy, but reversed the judgment for Mr. Wood. Petitioner-Defendant's Motion for Rehearing and Suggestion for Rehearing En Banc were denied by the Court of Appeals on September 11, 1984.

———o———

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals' Decision Is Correct And Consistent With This Court's Decisions And The Guarantees Of Free Speech And Press Embodied In The First Amendment.

A. The Court Of Appeals' Recognition Of A Private Citizen's Right To Privacy Does Not Conflict With The Rights Of Free Speech And Press Guaranteed By The First Amendment.

In 1974, while recognizing that tension necessarily existed between the protection commanded by First Amend-

ment rights and the States' protection of private citizens' reputations, this Honorable Court provided the States indispensable freedom in defining the standard of liability to be imposed upon publishers of defamatory falsehoods injurious to private individuals. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-348 (1974). This Court recognized the importance of defining a broad rule which could be applied to accommodate the important competing individual and constitutional rights. 418 U.S. at 347. In *Gertz*, the Court not only reasoned that a private individual was more deserving of protection, but concluded that where no evidence of fame, notoriety, or societal involvement was apparent, "an individual should not be deemed a public personality for all aspects of his life." 418 U.S. at 353.

> Further, this Court has more recently indicated that:
> [T]here *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 488 (1975). In *Cox*, the Court expressly recognized that an invasion of an individual's right to privacy might lie where a publisher appropriates a name or photograph or works an intrusion into seclusion by publishing falsehoods. 420 U.S. at 490.

In their timeless article entitled *The Right to Privacy*, Warren and Brandeis aptly stated that:

> [M]odern enterprise and invention have, through invasions upon his privacy, subjected [man] to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890). Certainly those same observations, as well as the recognition of the right to privacy by this

Court, hold true where a nude photograph of a housewife is published without her consent in the context of a hard-core, sex-centered magazine. (Plaintiff's Exhibit 1, p. 94). The Fifth Circuit has followed the rationale in *Gertz* and, as in this case, has recognized a right of action in a private individual consistent with the rights guaranteed by the First Amendment when the publisher of a pornographic magazine recklessly invades that person's privacy by placing her in a false light in the public eye. *Braun v. Flynt,* 726 F.2d 245 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 252 (1984).

Without doubt, Hustler blatantly invaded LaJuan Wood's right to privacy when it published her nude photograph, in context with a false fantasy, thereby placing her in a false light in the public eye. Mrs. Wood suffered severe mental anguish, humiliation, suffering, and harm to reputation. (Tr. Vol. I, pp. 20-21; 104). The Court of Appeals correctly upheld the judgment in Mrs. Wood's favor for false light invasion of privacy.

As this Honorable Court explained in *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), mental anguish, humiliation, and suffering are all injuries which may be compensated for "consistently with the Constitution upon a showing of fault." 424 U.S. at 460. Such a showing was established at trial and ruled upon by the United States District Court. For these reasons alone, the writ should be denied.

B. The Court Of Appeals Correctly Interpreted This Court's Decision In Gertz v. Robert Welch, Inc. As A Modification Of The Principles Announced In Time, Inc. v. Hill.

In *Time, Inc. v. Hill,* 385 U.S. 374 (1967) this Court extended the *New York Times* "actual malice" standard to

preclude recovery under a New York right to privacy statute where false reports of matters of public interest were concerned. 385 U.S. at 387; *See also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The statute in *Time* provided a right of action to a newsworthy person when his name, picture, or portrait was the subject of a fictitious report or article. 385 U.S. at 384, n. 9.

Some writers have suggested that it would be a difficult task to determine the impact which *Gertz* had on *Time*. Pember and Teeter, *Privacy and the Press Since Time, Inc. v. Hill,* 50 Wash. L. Rev. 57, 75 (1974). Yet the same writers suggest that use of a "public interest test" would be inappropriate for protecting an individual's right to privacy because areas of private life remain private by definition. *Id.* at 77. This Court's decision in *Gertz* can logically be interpreted as a modification of the "false-light" principles announced in *Time, Inc. v. Hill,* 385 U.S. 374 (1967), for several reasons.

First, extension of the *New York Times* barrier to bar recovery by private citizens injured by publication of defamatory falsehoods would significantly abridge, for no justifiable reason, the individual's right to protection from this type harm. *See Time, Inc. v. Firestone,* 424 U.S. 448, 456-57 (1976). That is the exact rationale which led this Court to reject the subject matter or "public interest test" for determination of whether a private individual's recovery for injuries occasioned by defamatory falsehoods was precluded by the *New York Times* "actual malice" standard. *See generally Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *Time, Inc. v. Firestone,* 424 U.S. 448, 456-57 (1976). Similarly, the same rationale holds true where a

publisher claims a privilege on First Amendment grounds that a publication of a private citizen's nude photograph, along with a false sexual fantasy, is a matter of public interest.

Second, Dean Prosser has stated appropriately that:

> [T]here has been a good deal of overlapping of defamation in the false light cases, and apparently either action, or both will very often lie.

Prosser, *Privacy,* 48 Calif. L.Rev. 383, 400 (1960). The interest [concerned] in false light cases is that of reputation, "with the same overtones of mental distress as in defamation." *Id.* Further, "false light invasions of privacy, like defamation, necessarily involve "falsity". *Id.* at p. 407. Thus it is logical, as well as reasonable, to apply the rationale announced by the Court in *Gertz* for defamation cases to false light invasion of privacy cases, especially where a private citizen is concerned.

Further, application of the principles announced by the Court in *Time, Inc. v. Hill* to false-light invasion of privacy cases would involve Courts in *ad hoc* determinations of matters of public interest. That is the exact result of which the Court expressly disapproved in *Gertz. Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345-346 (1974). The Court specifically stated that:

> [T]he "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. 418 U.S. at 346.

The reasoning in *Time, Inc. v. Hill,* 385 U.S. 374 (1967) would impose the *New York Times* barrier upon a private citizen placed in a false light in the public eye merely be-

cause the situation constituted a "matter of public interest." 385 U.S. at 387-88.

Ideally, the principles announced by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), should apply to false-light invasion of privacy cases because of the important right a person has to protection of his privacy, the fact that the right to privacy deserves Constitutional protection, and because of the inherent overlap between the torts of defamation and false-light invasion of privacy. *McKenna, False-Light: Invasion of Privacy?*, 15 Tulsa L.J. 113, 136-37 (1979). The Court of Appeals correctly interpreted this Honorable Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as a modification of the principles announced in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). For these reasons, the writ should be denied.

II. The Court Should Not Undertake A Review Of The Facts On Writ Of Certiorari Because The Record Establishes An Invasion Of Privacy With Convincing Clarity.

Hustler challenges the District Court's findings of fact that Hustler failed to follow its own "verification procedure," and urges this Court to undertake a *de novo* review of the facts in this case. This Court should deny the writ and refuse to undertake a review of facts already found and accepted as such by both the District Court and the Court of Appeals because those facts are not clearly erroneous and establish with convincing clarity that Hustler worked an outrageous invasion of LaJuan Wood's privacy. (Findings of Fact 12-13). The District Court expressed "grave doubts about the adequacy of Hustler's verification process." (Findings of Fact 12). Further,

the District Court ruled it unnecessary to decide whether the "procedure" was adequate because the Court found that Hustler failed to follow its own "procedure".[2] Findings of Fact 12). Based upon these facts and the other testimony obtained at trial, the District Court concluded that Hustler acted with reckless disregard for whether the information in the release was true and for whether LaJuan actually consented to the publication. (Findings of Fact 15). Further, the District Court found that the Hustler employee charged with verification in this case, Stephanie Ross, displayed an attitude which impaired her ability to evaluate the validity of the release. (Findings of Fact 13). Judging Stephanie Ross' credibility on the stand, the Court also found that it would be impossible to convince her of the fraudulence of *any* release. (Findings of Fact 13).

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[2] Specifically, Jim Heinsch, Managing Editor for Hustler at the time of the publication in question, testified that if anything suspicious appeared on the face of the release be photographed and accompanying text would not be published. (Tr. Vol. II, p. 125). However, that very procedure was disregarded by Hustler, as Hustler's Research Assistant, Stephanie Ross, and Hustler's Associate Editor, Kelly Garrett, indicated that the research staff members considered the submission of the photograph, accompanying text, and Mrs. Wood's name "with some mirth, that this ['Lay you on Wood'] was a very clever play on words." (Tr. Vol. I, p. 52). Also, Hustler made no attempt to determine the identity of Kelley McConkey or her relationship to Mr. and Mrs. Wood, even though the release indicated that the prize money was to be mailed to her and listed the same address as Mrs. Wood. (Tr. Vol. I, p. 7). Further, Stephanie Ross, as Research Assistant for *Hustler* Magazine charged with the responsibility of verifying the release, failed to meet even the rudimentary requirements that Hustler had set for verifications. (Tr. Vol. I, p. 7). Finally, Hustler failed to request a social security number in the release from that which Kelley McConkey prepared, even though the February 1980 edition of *Hustler* Magazine included such a request for verification purposes.

In addition to the findings of fact made by the District Court and accepted by the Court of Appeals, Federal Rule of Civil Procedure 52(a) provides in pertinent part that:

> [F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses . . .

This Court should not undertake a *de novo* review of the findings of fact made by the District Court and accepted by the Court of Appeals because those findings are not clearly erroneous. The findings of fact establish reckless disregard for the truth or falsity of the matters published on Hustler's part, as well as a reckless disregard for the offensiveness of the material published. (Findings of Fact 15).

Petitioner cites *Bose Corp. v. Consumers Union of U. S., Inc.*, 104 S.Ct. 1949 (1984), for authority that this Court should undertake a *de novo* review of the facts in this case. In *Bose*, the Court was concerned with a product disparagement suit, not an invasion of privacy. 104 S.Ct. at 1953. Further, petitioner Bose Corporation was a public figure, and did not contest the applicability of the *New York Times* actual malice standard. 104 S.Ct. at 1955.

In this case, the facts first establish with convincing clarity an invasion of privacy and second LaJuan Wood was not a public figure. (Findings of Fact 17-18). Thus, the *New York Times* "actual malice" test is not applicable here. Even if that standard were applicable under *Time, Inc. v. Hill*, 385 U.S. 374 (1967), it would not bar recovery for false light invasion of privacy because the picture of La-

Juan Wood in the nude was of no legitimate concern to the public. (Findings of Fact 17). Further, this Honorable Court should not undertake a review of the facts on writ of certiorari because the record establishes reckless disregard on Hustlers' part for the truth or falsity of the publication, as well as an invasion of LaJuan Wood's privacy. As stated in *Bose,* "such determinations are best left to the trial judge." *Bose Corp. v. Consumers Union of U.S., Inc.,* 104 S.Ct. 1949, 1969 (1984) (Rehnquist, J., joined by O'Connor, J., dissenting).

———o———

CONCLUSION

In conclusion, the petition for writ of certiorari should be denied because the Court of Appeals' decision below is consistent with this Court's applicable decisions. The Court of Appeals' recognition of a private citizen's right to privacy does not conflict with the rights guaranteed by the First Amendment. The petition for writ of certiorari should be denied for this reason alone.

Further, the Fifth Circuit Court of Appeals correctly interpreted this Court's decision in *Gertz v. Robert Welch, Inc.* as a modification of the principles announced applicable to false-light privacy cases in *Time, Inc. v. Hill.* This Court should not undertake a review of the facts in this case on writ of certiorari because the record establishes an invasion of LaJuan Wood's privacy by Hustler, as well as "actual malice" on Hustler's part, with convincing clar-

ity. For each of these reasons alone the writ should be denied.

Respectfully submitted,

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